

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TORY LEE MILLER

§

v.

§

CIVIL ACTION NO. 6:06cv522

DIRECTOR, TDCJ-CID

§

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND ENTERING FINAL JUDGMENT

The Petitioner Tory Miller, proceeding *pro se*, filed this application for the writ of habeas corpus under 28 U.S.C. §2254 complaining of the legality of his conviction. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

After review of the pleadings, the Magistrate Judge issued a Report on December 19, 2006, recommending that the petition be dismissed without prejudice because Miller failed to exhaust his state remedies. The Magistrate Judge observed that Miller said that he took a direct appeal of his conviction, but furnished no information regarding this appeal; the on-line records of the Twelfth Judicial District Court of Appeals shows that Miller's appeal was still pending as of the date that he sought federal habeas corpus relief. Because Miller did not complete the exhaustion process, the Magistrate Judge recommended dismissal of the case without prejudice to allow him to do so. The Magistrate Judge also recommended that the Court deny Miller a certificate of appealability *sua sponte*.

A copy of this Report was sent to Miller at his last known address, return receipt requested, but no objections have been received; accordingly, he is barred from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of

plain error, from appellate review of the unobjected-to proposed factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has reviewed the pleadings in this case and the Report of the Magistrate Judge. Upon such review, the Court has determined that the Report of the Magistrate Judge is correct. It is accordingly

ORDERED that the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled application for the writ of habeas corpus be and hereby is DISMISSED without prejudice. Miller may again seek habeas corpus relief upon completion of the exhaustion process, if he has not already received the relief which he seeks. It is further

ORDERED that the Petitioner Tory Lee Miller is denied a certificate of appealability *sua sponte*. Finally, it is

ORDERED that any and all motions which may be pending in this action are hereby DENIED.

So ORDERED and SIGNED this 12th day of February, 2007.

A handwritten signature in black ink, appearing to read "LEONARD DAVIS".

**LEONARD DAVIS
UNITED STATES DISTRICT JUDGE**